UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

NOV 30 2012

Herschel T. Vinyard
Secretary
Florida Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Dear Secretary Vinyard:

The U.S. Environmental Protection Agency, Region 4, has completed our review of the Florida Department of Environmental Protection's (FDEP) amendments to Chapters 62-302 and 62-303 of the Florida Administrative Code. These revisions, which FDEP transmitted to the EPA on June 13, 2012 with the necessary certification from the FDEP General Counsel, establish numeric nutrient criteria for lakes, springs, flowing waters, several estuaries (Tampa Bay, Sarasota Bay, Charlotte Harbor, and Clearwater Harbor/St. Joseph Sound), and South Florida marine waters. These revisions also establish a quantitative approach that the EPA believes will result in better protection for more sensitive downstream waters, such as lakes and estuaries, as well as procedures for developing site-specific alternative criteria. Enclosed in the June 13, 2012 submittal, your office submitted important supportive documentation, including Technical Support Documents (TSDs) and, subsequently, a final September 2012 Implementation Document. These documents provide important information with respect to the scientific basis of FDEP's numeric nutrient standards and FDEP's intentions regarding their implementation.

We have carefully reviewed the amendments to Chapters 62-302 and 62-303, in conjunction with the TSDs and the Implementation Document, and I am pleased to inform you that we find that this package, taken as a whole, comports with the requirements of the Clean Water Act (CWA) and we approve the pertinent provisions for the waters covered as changes to the State's water quality standards in accordance with 40 CFR Part 131, as further described below and in the enclosure and subject to the outcome of consultation under the Endangered Species Act (ESA).

Moreover, FDEP's rules make significant advancements to the approach of reducing nutrient pollution in Florida waters. The hierarchical approach gives preference to local site-specific information that best translates the narrative criteria into numeric values. If site-specific information is not available, the preference is to use a quantifiable stressor-response relationship that represents a well established and reliable scientific approach to development of numeric nutrient values. Where no quantifiable stressor-response relationship has been established, FDEP relied upon reference-based nutrient thresholds as described in the EPA guidance in conjunction with biological information (such as for streams) to derive numeric criteria. Since adverse effects of nutrient over-enrichment primarily manifest themselves through excessive algae and plant production, FDEP's criteria for streams incorporate the use of biological information, such as floral response variables, to identify impaired streams. This biological information augments the reference-based nutrient thresholds. FDEP combines the floral response variables and nutrient thresholds with a response variable to address faunal health (the Stream Condition

Index) and procedures to address non-stable conditions (i.e., increasing trends in nutrient levels). This integrated approach provides a strong basis for protecting streams and downstream waters that is biologically responsive. It builds upon FDEP's extensive experience and technical expertise in assessing water bodies for biological impairment. It also addresses the inherent variability in response to nutrient levels among streams by allowing streams that demonstrate healthy flora and fauna in a stable context to meet the integrated criterion. Importantly, where data are lacking, the State's rules err on the side of caution by listing waters as impaired pending further data collection. This overall hierarchical method to deriving numeric criteria for lakes, springs, streams and estuaries makes for a well-balanced and technically sound approach that is more effective and efficient than FDEP's existing approach of individual interpretations of the narrative for each and every water body in the State.

The EPA's objective is for FDEP to adopt new or revised water quality standards relevant to the control of nutrients for all remaining Florida waters that are determined to be Class I, II, and/or III water bodies, which are covered by EPA's January 14, 2009, determination, thereby possibly eliminating the need for EPA promulgation of federal rules or enabling EPA withdrawal of federal rules. However, to comply with the requirements of the Consent Decree in *Florida Wildlife Federation v. Jackson,* No. 4:08cv324 (N.D. Fla), we are proposing a Phase I remand rule that covers those flowing waters that are Class I and/or III, but whose coverage is uncertain under FDEP's rules, together with numeric downstream protection values (DPVs) for unimpaired lakes. It is our understanding that FDEP's numeric water quality criteria apply to all Class I and/or III flowing waters unless and until FDEP makes an affirmative determination that a particular water body meets one of the exclusions under F.A.C. 62-302.200(36), i.e., it is a tidally influenced segment, non-perennial stream, or an actively maintained conveyance, such as a canal or ditch. It is the EPA's view that any waters excluded by Florida's stream definition that are Class I and/or III still merit the protection afforded by numeric nutrient criteria because these waters may provide important habitat for a diverse range of aquatic plants and animals and may be vulnerable to the effects of nutrient pollution with one exception: The EPA believes that our numeric nutrient criteria are not applicable to wetlands, including intermittent stream segments that the State determines function as wetlands, because fluctuating hydrologic conditions typically result in the dominance of wetland taxa.

Our Phase I remand proposal is not a new exercise of federal authority and it does not currently impose any requirements on the State. Rather, it is a response to the court's decision remanding parts of the Phase I rule for further explanation by the EPA. We recognize that flowing waters that are Class I and/or III and that may be excluded from the definition of streams in the State's rule, as discussed above, may also raise unique issues that would benefit from further discussion with FDEP. We are open to alternative approaches to addressing any Class I and/or III waters that may not be covered by FDEP's rules. We intend to work closely with FDEP to arrive at a path forward that will result in actions by the State that may eliminate the need for our federal rules to be finalized and that will enable us to withdraw the final federal rules for lakes and springs, including model-based numeric downstream protection values (DPVs) for lakes and default DPVs for impaired lakes.

Also, as required by the Consent Decree, we are proposing a Phase II rule that covers the remaining estuaries and coastal waters not covered by FDEP's rules, South Florida flowing waters (with the exception of those waters in the Everglades Agricultural Area and the Everglades Protection), and numeric DPVs for estuaries. With regard to our proposal of numeric DPVs for unimpaired lakes that is contained in our Phase I remand proposal noted above and the numeric DPVs for estuaries in our Phase II proposal, we believe FDEP's quantitative downstream protection approach, in combination with numeric nutrient criteria applicable to streams, springs, lakes, estuaries, and coastal waters, achieves timely and effective protection of downstream waters. That said, while the EPA believes that FDEP's

downstream protection approach is quantitative in nature, the rule provisions themselves do not consist of numeric values, which is what the January 2009 determination and Consent Decree require. In order to acknowledge and accommodate Florida's innovative and protective approach, we are amending our original January 14, 2009, determination by determining that quantitative approaches designed to ensure the attainment and maintenance of downstream water quality standards are sufficient to meet CWA requirements and that numeric DPVs are therefore not necessary in Florida. We will shortly be requesting that the Court modify the Consent Decree to not require numeric criteria for protection of downstream water quality standards based on the amended determination. Provided the Court grants our request to modify the Consent Decree, The EPA will not expect to finalize numeric DPVs for Florida and would expect to propose to withdraw the numeric DPVs for lakes that were upheld as part of the Phase I rule.

We acknowledge and commend FDEP's recent efforts to move forward to adopt numeric nutrient criteria for the Panhandle estuaries. We will continue to work closely with FDEP as they develop numeric criteria for the remaining estuaries and develop a path forward on establishing new or revised water quality standards relevant to the control of nutrients for the remaining coastal and South Florida flowing waters. We are hopeful that these efforts will result in actions by the State that will eliminate the need for our Phase II federal rules to be finalized or for the EPA to be able to withdraw such rules swiftly after any EPA approval of any FDEP numeric nutrient criteria for these waters.

It is our understanding that the provisions of F.A.C. 62-302.531(9) are not triggered by the actions the EPA is taking today, both in this document and in the EPA's Phase I and Phase II proposals. If any interpretation of this provision or any modification or decisions with respect to FDEP's TSDs or the Implementation Document prevents FDEP's numeric nutrient criteria from becoming effective for Florida's lakes, springs or flowing waters or means FDEP will not or cannot implement the rules consistent with the EPA's approval, then the EPA may need to revisit this approval decision to either modify or withdraw it. For those reasons, the EPA reserves its authority to revisit this approval decision in the future should any of these contingencies occur. This would result in our Phase I lakes and springs criteria taking effect and the EPA would possibly proceed to finalize numeric nutrient criteria for all Class I and/or III flowing waters in accordance with our Consent Decree obligations for the Phase I remand rule. The EPA wants and intends to work closely with FDEP with the hope of avoiding any of these contingencies from happening.

In summary, the EPA is approving the new/revised water quality standards for the waters covered by FDEP's rule in their entirety, consistent with 40 C.F.R. part 131 and the Clean Water Act. As mentioned above, this approval is subject to the outcome of consultation under the ESA; FDEP being able to implement their rule consistent with their Implementation Document and other supporting documents submitted to the EPA by FDEP; interpretation of F.A.C. 62-302.531(9) to allow the EPA to propose and if necessary promulgate NNC for the waters not covered by FDEP's rule; and, with respect to FDEP's downstream protection approach, to the district court modifying the Consent Decree to not require numeric criteria to protect downstream waters (as described above). As a result, the EPA reserves its authority to revisit this approval decision in the future and to modify or withdraw it, as appropriate. In addition, The EPA is proposing to stay the Phase I rule for lakes and springs (and DPVs), which will become effective on January 6, 2013, to November 15, 2013, subject to the district court allowing the EPA to finalize such stay. Further, the EPA is re-proposing numeric criteria for flowing waters and DPVs for unimpaired lakes in accordance with the District Court's February 18, 2012 order. The EPA is proposing the Agency's Phase II rule that addresses estuaries, DPVs for estuaries, coastal waters, and South Florida flowing waters (with the exception of waters in the Everglades Agricultural Area and the Everglades Protection Area), consistent with the Consent Decree. Finally, the EPA is committed to work

with FDEP to arrive at a path forward that will result in actions by the State that may eliminate the need for our federal rules to be finalized (or enable the EPA to withdraw its federal rules swiftly if already finalized) and that will enable us to withdraw the final federal rules for lakes and springs, including model-based numeric downstream protection values (DPVs) for lakes and default DPVs for impaired lakes.

To arrive at our decisions today, there has been extensive coordination between the EPA and FDEP. The EPA also engaged in technical conversations with the National Estuary Programs (NEPs), which were the primary entities that developed the numeric criteria for the estuaries in the rule. These include the Tampa Bay, Sarasota Bay and Charlotte Harbor NEPs. All of these discussions and exchanges of clarifying information were invaluable in the Agency's review process. We greatly appreciate the time and effort of FDEP and the NEPs for the willingness to participate in this informative process.

We want to compliment you on the effort and commitment you and your staff demonstrated in developing your Rules. We believe FDEP's rules, and the supporting documentation you have provided, once implemented, will take a significant step towards protecting and restoring water quality in Florida. We look forward to future communication and collaboration between our Agencies as you move forward with implementation. If you have any questions or concerns, please do not hesitate to call me at (404) 562-9470 or Ms. Joanne Benante at (404) 562-9125.

Sincerely,

James D. Giattina
Director, Water Protection Division

Enclosure